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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 585

J. EDWARD JONES, PETITIONER

v.

JOSEPH P. KENNEDY, JAMES M. LANDIS, GEORGE C. MATHEWS, AND ROBERT E. HEALY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The District Court did not render an opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 84–89) is reported in 121 F. (2d) 40.

JURISDICTION

The judgment of the Court of Appeals was filed on March 17, 1941 (R. 90). A petition for rehearing was denied on April 26, 1941 (R. 90–91). The petition for a writ of certiorari was filed on

September 4, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the facts alleged in the complaint charge respondent members of the Securities and Exchange Commission with acts palpably beyond the scope of their official duties, and, if so, whether such alleged acts are tortious.

2. Whether respondents are liable in damages for acts of their subordinates not directed or approved by them.

3. Whether attorneys for the Securities and Exchange Commission may represent members of the Commission when sued as individuals for acts performed in their official capacity.

STATEMENT

This case was decided by the District Court upon respondents' motion to dismiss petitioner's second amended complaint.[1] The District Court granted this motion (R. 76–79) and the court below affirmed (R. 90). The allegations of the complaint may be summarized as follows:

The respondents are the four persons who, at the time of the actions alleged in the complaint, were

[1] This second amended complaint was filed by leave of the District Court after two earlier complaints (R. 1–8, 15–50) had been dismissed for failure to state a claim upon which relief could be granted.

the incumbent members of the Securities and Exchange Commission, an independent agency of the Federal Government established by Section 4 (a) of the Securities Exchange Act of 1934 (48 Stat. 881, 15 U. S. C. §§ 78 a–jj) to administer that Act and the Securities Act of 1933 (48 Stat. 74, 15 U. S. C. §§ 77 a–aa). Also named as defendants in the complaint are Burns, Flynn and Rabell, former employees of the Commission. These defendants, however, were not served and are not now before the Court.[2]

The complaint alleges that certain acts of the respondents undertaken by them in purported exercise of their official duties were in fact part of a conspiracy to destroy petitioner's business for the purpose of vindicating the Honorable Harold L. Ickes, Secretary of the Interior, with whom petitioner had been engaged in a dispute (R. 57–58). To the charges involving purported official acts of the Commission, the complaint adds allegations regarding allegedly improper acts, "in furtherance of said conspiracy", by individual Commissioners, and by Burns, Flynn and Rabell.

The purportedly official acts of the Commission alleged to have been part of the conspiracy revolve around a stop order proceeding instituted by the Commission in which the petitioner was

[2] There is no foundation whatever, in the record or otherwise, for petitioner's assertion that these defendants "evaded service of process" (Pet. 8).

named as respondent (R. 69–71). The facts relating to that proceeding are these:[3] In May 1935 petitioner filed with the Commission under the Securities Act of 1933, a registration statement covering an issue of investment trust certificates which he proposed to offer to the public. Absent amendment or action by the Commission, this statement would have become effective on the twentieth day after it was filed. On the nineteenth day, the Commission notified petitioner of the institution of stop order proceedings, based upon a charge that the statement contained material misrepresentations and omissions. Before the hearing to determine whether the stop order should issue, the Commission issued a *subpoena duces tecum*. Instead of complying, Jones appeared by counsel at the hearing and sought to withdraw his registration statement. A rule of the Commission provided for withdrawal upon consent of the Commission; the Commission did not consent. At a later hearing Jones again appeared by counsel and moved for orders permitting withdrawal and dismissing the proceeding. The Commission denied these motions. A petition for review was dismissed by the Circuit Court of Appeals for the Second Circuit for lack of

[3] For purposes of the following description of the stop order proceeding, we refer not only to the allegations of the complaint but also to the recitals in the opinion of this Court in *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, an opinion referred to in the complaint and upon which petitioner strongly relies to establish his claim for relief.

jurisdiction. 79 F. (2d) 617, certiorari denied, 297 U. S. 705.

Jones having declined to comply with the *subpoena,* the Commission, as provided by the Act, applied to the United States District Court for the Southern District of New York for the requisite order compelling compliance. Judge Caffey of that court upheld the Commission's contention that the withdrawal was ineffective, and entered the requested order. 12 F. Supp. 210. The Circuit Court of Appeals for the Second Circuit affirmed Judge Caffey's action. 79 F. (2d) 617. On writ of certiorari this Court reversed the decisions of the lower courts. 298 U. S. 1.[4]

The complaint recites in detail the various actions of the Commission in the conduct of this proceeding, charging that the acts were done "maliciously," "wrongfully," "unlawfully," and "without support in right principle or in law" (see, e. g., R. 67, 68, 71, 72, 73). The individual Commissioners are alleged to have acted "maliciously," "without just or probable cause," and "wholly beyond the scope of their authority" (see, e. g., R. 58, 66, 67, 68, 69, 72).

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[4] Shortly after the decision of this Court, petitioner was indicted by a grand jury for the Southern District of New York on the basis of evidence gathered by the staff of the Commission. In the trial of this indictment, charging violation of the mail fraud statute, petitioner was acquitted (R. 68).

In addition to the purportedly official acts of the Commission, the complaint sets forth two isolated actions alleged to have been taken by respondents Kennedy and Landis in furtherance of the conspiracy.[5] Kennedy is alleged to have told one of petitioner's clients that the Securities and Exchange Commission had "closed" the offices of Jones and that he was not "allowed to sell royalties any more" (R. 63). Landis was alleged to have said to some unnamed person on the telephone that the respondents did not "have anything on" Jones but that they were "going to get that guy" (R. 66).

Several allegations are contained in the complaint concerning the actions of defendants Burns, Flynn, and Rabell, who were not served. There is no allegation, however, that these actions were taken under the direction or with the approval of the respondents.

The court below, in affirming the District Court's dismissal of the complaint, classified the acts alleged in the complaint in three categories: (1) activities of the Commission; (2) acts of Commissioners; and (3) acts of subordinates (R. 85–89). As to the first class, activities of the Commission, the court held, in accord with the doctrine of *Spald-*

[5] The complaint contains no allegation against respondents Mathews and Healy.

ing v. *Vilas*, 161 U. S. 483, that public officers when acting within the scope of their official authority are immune from suits for damages (R. 85), and that petitioner had not met the task of showing acts which fall outside of the immunity (R. 86). As to the second class of acts, those of individual Commissioners, the court held that the complaint failed as a matter of tort law, even in the absence of official immunity, to state any claim upon which relief could be granted (R. 87). As to the third class, acts of subordinates, the court held, in accord with *Robertson* v. *Sichel*, 127 U. S. 507, that the defendants could not be held liable for acts of their subordinates not alleged to have been done under their direction and approval (R. 88–89).

The court further dismissed petitioner's contention that Messrs. Lane, McNulty, and Kline, attorneys for the Securities and Exchange Commission, had no right to represent respondents Landis, Mathews, and Healy. No question was raised as to whether the appearance of Messrs. Lane, McNulty, and Kline had been authorized by the individual Commissioners, or by the Commission as a body; only the right of government attorneys to appear in such a case was challenged. The court confirmed this right.

ARGUMENT

1. This Court held in *Spalding* v. *Vilas*, 161 U. S. 483, that an executive officer of the Government is

immune from civil suits for damages arising out of acts done by him in the course of performing functions within the general scope of his authority, and that his immunity is forfeited only when he acts "in reference to matters which are manifestly or palpably beyond his authority." Petitioner does not challenge this established principle (Pet. 16–17); the primary question he seeks to have reviewed is simply whether the court below properly applied this principle to the particular facts alleged in the complaint. This question, peculiar to this particular case, does not present an issue of such general importance as to warrant review by this Court.

2. In any event, the decision below holding that the rule in *Spalding* v. *Vilas, supra,* applies to the principal allegations of the complaint is, we believe, manifestly correct. As pointed out in the Statement, the court below divided the allegations of the complaint into three categories; the first and by far the most important category is comprised of those allegations which relate to purportedly official acts of the Commission. It was those allegations which the court below dismissed upon the authority of the *Vilas* decision.

Stripped of adjectival surplusage, petitioner's case, insofar as it rests upon purportedly official acts of the Commission, may be summarized as follows: In 1934 the Commission began an investigation of Jones's sales of securities in interstate commerce; in connection therewith the Commis-

sion subpoenaed as witnesses a number of his customers; members of the Commission's staff examined his books and records and investigated to determine whether he was in fact violating the Act; the Commission issued announcements to the public as to the institution and progress of the investigation; on the basis of the evidence adduced in the investigation the Commission instituted an injunction suit, and the petitioner consented to the entry of a preliminary injunction (R. 58–59; Ex. D to complaint, pp. 124, 127).

After entry of the preliminary injunction Jones filed a registration statement; after an examination of this statement the Commission issued a notice of hearing to determine whether it was false or misleading or otherwise deficient; the Commission appointed examiners to conduct the hearing who were attorneys employed by the Commission; the Commission issued a *subpoena* directing Jones to testify at the hearing and to produce certain books and records; at the hearing Jones attempted to withdraw his registration statement; the Commission denied this request; shortly after the attempted withdrawal a new *subpoena* was issued which could not be served because Jones had left the city; the press was notified of this fact; thereafter Jones consented to service of the *subpoena* upon him; at the time set for his appearance he again attempted to withdraw his registration statement and refused to testify or produce docu-

mentary evidence; the Commission brought an action in the District Court for the Southern District of New York to enforce its *subpoena;* the district court ordered Jones to respond to the *subpoena,* this decision being affirmed by the circuit court of appeals; and their decision was reversed by this Court on certiorari (R. 69–73).

The evidence obtained by the Commission as to the sales of securities by petitioner was subsequently presented to a grand jury, which returned an indictment against petitioner for the fraudulent sale of securities; thereafter criminal proceedings were instituted against petitioner on the basis of said indictment; and he was acquitted by a jury (R. 68).

The recital of the foregoing facts is embellished in the complaint by a wealth of descriptive detail designed to lend color to an otherwise commonplace history of investigation and legal proceedings arising out of suspected violations of the law against selling securities by fraud. But this embellishment cannot obscure the fact that petitioner has recited in his complaint a course of conduct which falls clearly within the general scope of the authority vested in respondents by the Securities Act of 1933. Accordingly, under the established rule of *Spalding* v. *Vilas,* respondents are entitled to immunity from any claim for damages arising out of that conduct. It is immaterial that the acts are alleged to have been done "maliciously"; under the rule in the *Vilas* case, official action cannot give

rise to personal liability even though it be motivated by malice. 161 U. S. at 499.

To lend support to his contention that respondents' conduct was beyond the scope of their authority, petitioner relies upon isolated portions of this Court's opinion in *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1. As appears from the facts of that litigation recited in the Statement (*supra*, pp 4–5), the case involved only one narrow question of procedural law: whether Jones's attempted withdrawal of his registration statement was effective to deprive the Commission of further jurisdiction in the stop order proceeding. Mr. Justice Sutherland, speaking for the majority, held that since the stop order proceeding had been instituted before the registration statement became effective, Jones was in the position of an applicant for a license who might, prior to the granting thereof, withdraw his application at will. The failure of the Commission to allow the withdrawal was said to find "no support in right principle or in law" and was characterized as "wholly unreasonable and arbitrary." 298 U. S. at 23.[6]

Despite the language used by Mr. Justice Sutherland in his opinion, it is evident that petitioner

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[6] However, Mr. Justice Cardozo, dissenting, said (298 U. S. at 29): "A subpoena *duces tecum* was issued by the Commission on June 13 before any attempt had been made to withdraw the registration statement. On June 18, the day of the attempted withdrawal, there was issued a second subpoena commanding the registrant to appear and testify,

cannot find in that litigation any support for his position that respondents acted palpably beyond the functions of their office. At most, the decision of this Court establishes that the Commission, called upon to determine the extent of its own jurisdiction, decided that question erroneously. If this was error, it was a reasonable one, as is established by the fact that it was thought not to be error at all by the District Court, the Circuit Court of Appeals, and by Justices Cardozo, Brandeis, and Stone of this Court.[7] But reasonable or not, the mistake was one by a quasi-judicial body in making, in the first instance, an unavoidable determination of its own jurisdiction in a proceeding within the general scope of its authority. Stated otherwise, the erroneous action was taken by the respondents in the course of performing official functions in connection with matters entrusted by law to their supervision and control. Such action, as the court below held, falls squarely within the *Vilas* doctrine. See also *Bradley* v. *Fisher,* 13 Wall. 335, 352.

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and this was served upon him by the Marshal. Then and for months earlier a standing Regulation gave warning to him and to the world that without the consent of the Commission there could be no withdrawal of a statement once placed upon the files. I am persuaded that the Rule is valid; that the Commission had abundant reasons for maintaining jurisdiction; and that notice of withdrawal did not nullify the writ."

[7] See also *Resources Corporation International* v. *Securities and Exchange Commission*, 103 F. (2d) 929 (App. D. C.).

3. The holding of the court below that no claim for relief is stated by the allegations charging two specific improper acts, in the nature of slander, by Commissioners Kennedy and Landis likewise presents no question warranting the issuance of a writ of certiorari. It is unnecessary for us to show that the Court of Appeals correctly applied the law of slander to the allegations in question, since no attempt has been made by petitioner to show that the decision is incorrect as a matter of law or that it is in conflict with any decision of this Court or of any circuit court of appeals. The question is obviously not one of such a nature as to justify review by this Court in the absence of conflict.

4. Similarly, there is no occasion for this Court to review the holding of the court below that no cause of action against respondents is stated by the allegations charging misconduct on the part of former employees of the Commission. These allegations contain charges ranging from the alleged act of one employee in soliciting and accepting a bribe from petitioner to the alleged act of another employee in pushing a member of petitioner's staff into a fireplace. We do not detail these allegations, since it is clear, under the doctrine of *Robertson* v. *Sichel*, 127 U. S. 507, that superior executive officers of the Government are not individually responsible for the misconduct of their subordinates, at least where the superior officers do not direct or participate in the misconduct.

Petitioner seeks to avoid the *Sichel* doctrine by asserting that the complaint alleges "that the re-

spondents were aware of the activities of the subordinates and counseled and directed them as to their part in the conspiracy" (Pet. 30). On the basis of this assertion, petitioner urges that the court below failed to give proper effect to an applicable decision of this Court. Regardless of the merits of petitioner's position if his assertion were true, the fact is that the complaint contains no allegation that any act of a subordinate was done with the knowledge, approval, or acquiescence of any of the respondents.[8] In the absence of such an allegation the doctrine of *Robertson* v. *Sichel* is plainly applicable.

5. Petitioner asserts that Messrs. Lane, McNulty, and Kline are barred from representing the respondents in this action because they are attorneys employed by the Securities and Exchange Commission.[9] The point is made simply as an assertion, without support of authority,[10] and no

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[8] In paragraph 41 (R. 69) it is alleged that the defendants, "acting through defendant Flynn" (one of the subordinates named but not served as a defendant), interfered with the publication of petitioner's book. Apart from the failure of the allegation to state a claim as a matter of tort law, the court below correctly held (R. 88) that, "The preposition 'through' should not pierce the protection surrounding those who carry out the services of government, making the Commissioners liable for the acts of an employee."

[9] On September 30, 1938, Mr. McNulty resigned from the Commission's staff.

[10] The only cases cited deal with the right of a court to call upon an attorney to show his client's authorization to appear. However, no question has been raised in this case as to the attorneys' authority from their clients.

suggestion is made as to why the question is one justifying the grant of certiorari. The decision of the court below on this point was obviously correct; and the argument to the contrary displays a lack of merit bordering on frivolity.

CONCLUSION

The decision of the Court of Appeals is correct and presents neither a conflict of decisions nor a question of general importance. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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